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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. ~~911~~ [redacted] 20

UNITED FEDERAL WORKERS OF AMERICA (C. I. O.), ET AL.,
Appellants,

vs.

HARRY B. MITCHELL, ET AL

On Appeal From the District Court of the United States for the District of Columbia

ANSWER TO APPELLEES' MEMORANDUM

LEE PRESSMAN,
FRANK DONNER,
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INDEX

	Page
Statement	2
Statute and Rules Involved	3
Argument	4
Conclusion	12

TABLE OF CASES CITED

Bank of the U. S. v. *Swan*, 3 Pet. 68	10
Bingham v. *Morris*, 7 Cranch. 99	4, 10
Credit Company, Ltd. v. *Arkansas Central Railway Co.*, 128 U. S. 258	11
Evans v. *The State National Bank of New Orleans*, 134 U. S. 330	11
Ewin v. *Breedlove*, 17 Pet. 284	10
Hecht Co. v. *Bowles*, 321 U. S. 321	8
R. F. C. v. *Prudence*, 311 U. S. 579	5, 6
Richardson v. *Green*, 130 U. S. 104	11
Southern Pine Lumber Co. v. *Ward*, 208 U. S. 126	4, 10
Sparrow v. *Strong*, 3 Wall. 97	4, 10
Villabolos v. *U. S.*, 6 How. 81	11
Vogel v. *Saunders*, 93 F. (2d) 984	4, 10, 11

OTHER AUTHORITIES

Act of August 24, 1937, Section 3, U. S. C. Section 380(a)	2, 3
10 Cyclopedia of Federal Procedure (2d ed. 1943) 684	5, 11
Federal Rules of Civil Procedure, Rule 75(a)	6
Federal Rules of Civil Procedure, Rule 72	3, 7
Federal Rules of Civil Procedure, Rule 73(a)	5

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On Appeal From the District Court of the United States for the District of Columbia

ANSWER TO APPELLEES' MEMORANDUM[1]

The Solicitor General has filed a memorandum suggesting that the Court may be without jurisdiction to entertain this appeal or that dismissal of the appeal may be appropriate because of delay in docketing. In our opinion, the suggestion is completely without merit and the Court should refuse the suggestion and note jurisdiction.

[1] In view of the unusual nature of the appellees' memorandum we are not certain of the procedure which is applicable. We have, however, proceeded as though the memorandum were a motion to dismiss, and the provisions of Rule 7, paragraph 3, giving 20 days to answer, were assumed to apply.

STATEMENT

This action challenges the constitutionality of that sentence of Section 9(a) of the Hatch Act which forbids employees in the executive branch of the federal government to take any active part in political management of political campaigns. Appellants, individual federal employees and their Union, charge that the challenged provision violates the rights of freedom of speech, of the press and of assembly guaranteed under the First Amendment to the Constitution and also contravenes the Fifth, the Ninth and the Tenth Amendments. The case was heard by a three-judge court, convened pursuant to Section 3 of the Act of August 24, 1937, 28 U.S.C. § 380(a), and on September 26, 1944, that court refused the plaintiff's motion for an injunction, dismissed the complaint and granted summary judgment to the appellees. Section 3 of the Act of 1937 provides that "an appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree or judgment."

Application for appeal was made on October 25, 1944, and the appeal was allowed on October 26, both within the time prescribed. However, the docketing of the record took place on February 2, 1945, a date more than 60 days from the allowance of the appeal and also after January 15, 1945, the expiration date of an extension of time for docketing the record granted by Chief Justice Groner, a member of the three-judge court.* The memorandum of the government in this case was not filed until after the record had been filed and docketed in this Court.

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* There was some ambiguity in Justice Groner's orders. On December 16, 1944, he signed a citation returnable 40 days from its date, or on January 25. If this date rather than the January 15 date of his order of December 21 is applicable, the record was filed in time (January 25), but it was not docketed at that time because the clerk raised a question as to the timeliness of the filing and docketing was delayed until we assured ourselves that under the law as we understand it docketing the appeal would correct any deficiencies which existed.

STATUTE AND RULES INVOLVED

Section 3 of the Act of August 24, 1937, 28 U.S.C., § 380a, provides in part that:

> ". . . In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. . . ."

Rule 47 of this Court, governing appeals to this Court under the Act of August 24, 1937, provides that such appeals "shall be governed, as far as may be, by the rules of this court regulating the procedure on appeal in other cases from courts of the United States . . . The record shall be made up and the case docketed in this court within sixty days from the time the appeal is allowed."* Rule 11 of this Court governing the docketing of cases in appeals provides in part as follows:

> "1. It shall be the duty of the appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, before its expiration, the order of enlargement to be filed with the clerk of this court. If the appellant shall fail to comply with this rule, the appellee may have the cause docketed and the appeal dismissed upon producing a certificate, whether in term or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such appeal has been duly allowed. And in no

* Rule 72 of the Federal Rules of Civil Procedure provides that in such an appeal the record shall be "made and certified as prescribed by law and the Rules of the Supreme Court of the United States governing such an appeal."

case shall the appellant be entitled to docket the cause and file the record after the appeal shall have been dismissed under this rule, unless by special leave of the court."

ARGUMENT

1. The suggestion of the government is so completely without merit that we believe it may be completely disposed of merely by reference to the old and well established rule of this Court that late filing and docketing of the record is not a ground for dismissal where the record was filed and docketed by the appellant before the motion to dismiss. *Bingham* v. *Morris*, 7 Cranch. 99; *Sparrow* v. *Strong*, 3 Wall. 97; *cf. Southern Pine Lumber Co.* v. *Ward*, 208 U. S. 126, 136, 137; See also *Vogel* v. *Saunders*, 92 F. (2d) 984, 985 (App. D. C. 1937), where the court overruled previous decisions to adopt the rule of the *Bingham* and *Sparrow* cases, stating:

> "The federal rule is that a motion to dismiss on the ground that the transcript has not been filed within the prescribed time comes too late when the transcript has actually been filed. . . . [citing cases]
>
> "After due consideration, we conclude that the federal rule operates more effectively to accomplish the desired result. Under that rule, in order for an appellee to avail himself of the fact that appellant has not filed his transcript within the time prescribed, he must file a motion to docket and dismiss before such transcript is actually filed; if appellee waits until the transcript is filed, even though it be filed after the time prescribed, a motion to dismiss on this ground comes too late. This tends to insure diligence on the part of an appellee and to expedite the determination of appeals."

However, the instant action is one of vital importance to millions of government employees and involves basic constitutional rights. We therefore believe it appropriate

to enter into a full discussion of the matter to point out not only the erroneous nature of the government's suggestion but the serious practical consequences which would follow from that suggestion.

2. As we understand it, the government apparently suggests, that the provision in Section 3 of the Act of August 24, 1937, providing for docketing in this Court within 60 days of the allowance of an appeal might be considered jurisdictional. It is apparently implicit in this suggestion that the 60 day period may not be enlarged by the District Court, by this Court or by any justices thereof, that failure to docket in time may not be excused by the Court and may be availed of after actual docketing. The basis for the suggestion briefly stated is that since the 30 day provision for petitioning for allowance of appeal is undoubtedly jurisdictional, the 60 day period for docketing the appeal is also jurisdictional. The conclusion is stated by the government to be "not . . . unreasonable". It is submitted that such a position can be made to appear other than unreasonable only by ignoring both the practicalities of litigation and the history of docketing provisions. From the earliest days periods of time for filing notice of appeal or for application to appeal or for petitioning for permission to appeal have been regarded as jurisdictional and failure to comply requires dismissal.* It is equally clear from the history of such provisions that the subsequent period provided by court rule for filing and docketing the record in the appellate court is not jurisdictional. See e.g., 10 Cyclopedia of Federal Procedure (2d ed. 1943) 684.†

*There may be exceptional circumstances even in such cases. See opinion of Justices Reed and Roberts in *R. F. C.* v. *Prudence*, 311 U. S. 579, 583.

†Such a rule is not only clearly set forth in the cases but is codified insofar as appeals to a Circuit Court of Appeals are concerned by Rule 73(a) of the Rules of Civil Procedure. That rule provides that when a notice of appeal has been filed within the time prescribed "Failure of the appellant to take any of the further steps to secure the review of the judgment ap-

The reason for the distinction is obvious. The notice of appeal, the petition for allowance of appeal, or the filing of a similar document is a simple action which may be taken on his own motion by any party desiring to appeal. There is thus no burden in requiring that notice of intention to carry a case to an appellate court shall be made within a specified time. On the other hand, the filing and docketing of a record is no such simple matter. It requires not merely preparation of a paper in the office of appellant's counsel, rather it is a process which may be long and drawn-out for reasons not within the control of appellant's counsel. It requires the cooperation of the clerks of the courts involved and, in many cases, of opposing counsel (See, e.g., Rule 75(a) of the Federal Rules of Civil Procedure). A rigid period for filing and docketing might well result in meritorious appeals failing for reasons of slight consequence and in cases where no fault existed on the part of appellant. Thus, as stated in 10 Cyclopedia of Federal Procedure (2d ed. 1943) 682: "The return day being by the rules not to exceed 40 days from the signing of the citation leaves time which may prove insufficient for the clerk to make up the transcript which must also include the bill of exceptions." This Court in *R. F. C.* v. *Prudence*, 311 U. S. 579, has held that a provision for appeal requires only that an application must be filed in time but has denied that it also must be allowed in time. Mr. Justice Douglas stated (at p. 582):

> "If that were true, the existence of the right to appeal would be subject to contingencies which no degree of diligence by an appellant could control. Ambiguities in statutory language should not be resolved so as to imperil a substantial right which has been granted."

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pealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or when no remedy is specified for such action as the appellate court deems appropriate which may include dismissal of the appeal."

In the light of this well established distinction between periods for taking appeals and periods for docketing and filing of records, it would seem that only the clearest statement by the Congress could be regarded as intended to set up a different rule. However, the Act of August 24, 1937, contains no such statement. On the face of the statute the 30 day period for petitioning for appeal is absolute. On the other hand, the 60 day period for docketing is not absolute but is to be regulated "under such rules as may be prescribed by the proper courts." The rules prescribed by the proper courts in such cases have been set forth above.[6] They are Rules 47 and 11 of this Court.[7] Rule 11, by its terms, clearly indicates that the period for docketing the record is not jurisdictional for it contains specific provision for enlargement of time and paragraph 2 of the rule[7] clearly provides for waiver by the appellee of any deficiency in filing.[8]

The major difficulty with the government's suggestion in this respect lies in its assumption that Rule 11 may not be applicable. Rule 47 which the government states to be the applicable rule (see Memorandum, p. 6) is not the only rule involved. It is not self-sufficient and does not purport to be self-sufficient. It contains no provisions for procedure on docketing and no methods for challenging failure to comply with docketing procedures. Rather, by its terms it incorporates by reference "the rules of this Court regulating the procedure on appeal in other cases . . ." from federal courts. Since the rule applicable on appeals in

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[6] And also Rule 72 of the Federal Rules of Civil Procedure.

[7] Paragraph 2 of Rule 11 reads as follows:

> "2. But the appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed by the appellant within the period of time prescribed by this rule, or by the appellee within forty days thereafter, the case shall stand for argument."

[8] As we shall show later (p. 10, *infra*), the rule also clearly implies that a motion to dismiss comes too late after the record has in fact been docketed.

other cases with respect to docketing is Rule 11, Rule 47 can mean only that the procedure with respect to docketing set forth in Rule 11 shall be applicable to appeals such as the present one.

The government refers to the legislative history of the Act of August 24, 1937. Examination of that history shows that the docketing provision was not the subject of any discussion in the course of the legislative consideration of the Act. From this fact the government is unwilling to draw the obvious conclusion. Rather, it states: "There is no evidence in the legislative history of the Act of 1937 here involved as to whether or not the past appellate practice was in the minds of the framers of the Act." (Memorandum, p. 5) It seems to us clear, however, that the absence of special mention of the docketing provision in the Act compels the conclusion that Congress did not intend to disturb the well established "past appellate practice" uniformly applied in this Court and in the Circuit Courts of Appeals. Any other assumption is untenable. As this Court said in *Hecht Co.* v. *Bowles*, 321 U. S. 321, 329: "We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made."

The technical construction of the statute which the government suggests would, moreover, defeat the broad objectives of the Act of August 24, 1937. That statute is an expediting statute and provides for speedy determination of appeals by this Court. It directs an immediate convocation of a three-judge district court; it provides a direct appeal to this Court, and it states that this Court shall hear the appeal "at the earliest possible time" and give such an appeal "precedence over all other matters not of a like character." The ultra-technical and rigid approach of the government to docketing and other pro-

cedural requirements under such a statute would result in postponement or avoidance of final decision of important questions of constitutional law in direct contravention of the purpose of the statute. The instant case is an example of the unsatisfactory results of such application of the statute. Dismissal of the instant petition would leave the rights of federal employees generally and of the government in doubt. The provision of the Hatch Act in dispute would not be finally ruled either valid or invalid. The decision of the District Court would not be accepted by federal employees or by the government as final. One of the appellants would be dismissed from his job and the present appellants or most of them would be debarred from litigating their constitutional rights. Other federal employees, dissatisfied with the restrictions upon them, would be compelled to bring another suit and to go through the many useless motions necessary to bring the case here again and to make it ready for argument. Further, the rules so applied could not be applied solely in cases where the delay is by a private party who has failed in the lower court in his attack on the statute. It would have to be applied equally to cases where the government has lost below and in such cases would leave outstanding an unfavorable decision jeopardizing the enforcement of the statute for a long period of time. The rule would also have to be applied in private suits in which the government has intervened pursuant to Section 1 of the Act of August 24, 1937. In such cases under this section of the Act, which is identical with the provision now under discussion, the government's rights would be prejudiced by delay of the private parties in docketing the record. Such a construction should not be given to a statute which has for its purposes expedition; rather the more flexible rules generally applicable in the federal courts should be applied, for the purpose of those rules, like that of the Act of August 24, 1937, is "to expedite the determination of ap-

peals." *Vogel* v. *Saunders*, 92 F. (2d) 984, 985 (App. D. C. 1937).

In the light of all of these considerations it is submitted that the 60 day period for docketing the record under the Act of August 24, 1937, is not jurisdictional, that such period may be extended by the appropriate courts or judges thereof, that it may be waived, and that failure to comply may be excused by the court.

3. Since, as we have established above, the 60 day period is not jurisdictional, we may assume, contrary to the government's suggestion, that Judge Groner under Rule 11 had the power to extend the time for filing the record to January 15, 1945. We concede* that delay beyond that date in filing and docketing the record was a failure to comply with the rules of this Court and might have been the ground for a motion to dismiss made prior to the actual filing and docketing of the record.** However, the government did not follow the remedy provided in Rule 11 of itself docketing the record and moving to dismiss. Instead, it waited until appellants filed and docketed the record. Under the circumstances, decisions of this Court make it clear that the present motion or "suggestion" comes too late because it was made after the record had been filed and docketed. *Bingham* v. *Morris*, 7 Cranch. 99; *Sparrow* v. *Strong*, 3 Wall. 97.** See *Southern Pine Lumber Co.* v. *Ward* and *Vogel* v. *Saunders*, *supra*, p. 4.

The rule of those cases is clearly incorporated by implication in Rule 11 itself. That rule provides that fail-

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* Subject to the comment made in n. 1 above.

** In that event we should, of course, have opposed the motion, urging excuses for our default and pointing out that the delay occasioned no injustice or prejudice to the government. Such arguments may be successful even in reinstating appeals already dismissed. *Bank of the U. S.* v. *Swan*, 3 Pet. 68; *Gwin* v. *Breedlove*, 13 Pet. 284; see the last sentence of Rule 11(1), providing for reinstatement of an appeal already dismissed "by special leave of court."

** There was at one time an exception to this rule in the case of long delays extending beyond the expiration of the next term after the writ of

ure to docket in time may be the occasion for the appellee having the cause docketed and the appeal dismissed. It makes no provision for such a motion except in conjunction with docketing the case by the appellee. The implication is clear that once the appeal has been docketed by the appellant it is too late to move to dismiss the appeal for delay in docketing.

The rule of the *Bingham* and the *Sparrow* cases is a rule which is especially applicable to cases under the Act of 1937, for it will carry out the purposes of that Act to expedite the determination of important constitutional questions. As the Court of Appeals of the District of Columbia said in rejecting its earlier rule and following the *Bingham* and *Sparrow cases*, the rule of those cases "tends to insure diligence on the part of an appellee and to expedite the determination of appeals." *Vogel* v. *Saunders*, 92 F. (2d) 984, at 985.

The government does not contest the principle of these cases. Indeed, it does not mention them. It merely states that it is "not advised that any mitigating circumstance excused the failure of compliance with the statutory requirement." (Memorandum, p. 6.)

Under the rule of the *Bingham* and *Sparrow* cases, as we understand it, the reasons for an appellant's original default are immaterial after he has filed and docketed the record. The appellee has the right to an explanation only

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error was issue. *Evans* v. *The State National Bank of New Orleans*, 134 U. S. 330; *Credit Company, Ltd.* v. *Arkansas Central Railway Co.*, 128 U. S. 258, 259; *Villaboles* v. *U. S.*, 6 How. 81, although even in such a case the appeal might be allowed to stand if a "satisfactory excuse for the laches is made." *Richardson* v. *Green*, 130 U. S. 104, 111. That limitation on the rule, however, has been abolished, 10 Cyclopedia of Federal Procedure (2d ed., 1943) 684; *cf. id.* n. 91.

The Supreme Court rule considered in the *Bingham* case is set forth in 3 Cranch. 239 and requires the filing of the record "within the first six days of the term" where the judgment appealed from was rendered "at least thirty days previous to the commencement" of the term. The rule referred to in the *Sparrow* case is similar in terms and is set forth in 21 How. VII.

if he is diligent in docketing the record himself and moving to dismiss before the appellant dockets the record. We believe that if our reasons for delay were relevant, they would be found adequate. In any event, we would have been glad to advise the government of the details had it earlier expressed an interest in the matter.

CONCLUSION

The Court should reject the government's suggestion and note jurisdiction of the appeal.

Respectfully submitted,

LEE PRESSMAN,
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Counsel for Appellants.